Supreme Court of the United States

OCTOBER TERM, 1961

No. 713

UNITED STATES OF AMERICA

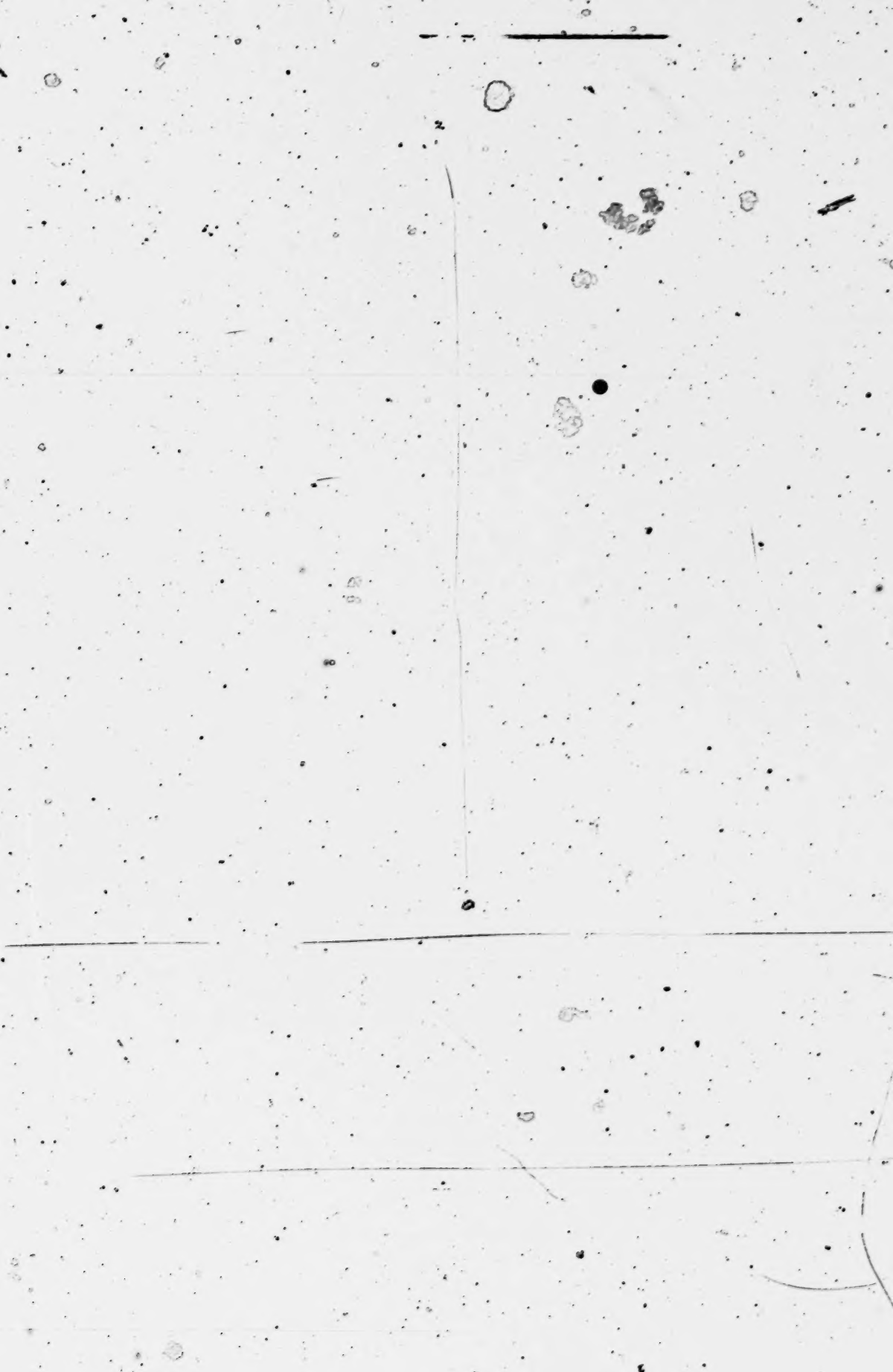
Respondent

v.

EDWIN MURRAY

Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT



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UNITED STATES OF AMERICA,

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EDWIN MURRAY,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Edwin Murray hereby petitions this Honorable Court for a writ of certiorari to review the judgment below of the United States Court of Appeals for the Second Circuit affirming the District Court's judgment of conviction on an indictment charging him in two counts with an unlawful, wilful and knowing attempt to defeat and evade a large part of the income tax due and owing by him for the calendar years 1952 and 1953 in contravention of Section 145(b) of the Internal Revenue Code of 1939, 26 U. S. C. 145(b), for the reasons hereinafter set forth.

Decisions Below

The opinion of the Court of Appeals for the Second Circuit is not yet officially reported. It is reproduced in the appendix to this petition and appears at page 274a of the certified record. The decisions of the District Court are set forth in the record printed for the Court below (R. 28a, 29a), nine copies of which will be filed with this petition. Supreme Court Rules, Rule 21(4), 23.

Jurisdiction

Jurisdiction is conferred on the Supreme Court
Section 1254(1) of Title 28, United States Code,
provides that:

> "Cases in the Courts of Appeals may be rev
> by the Supreme Court * * * (1) by writ of cert
> granted by the petition of any party to any
> criminal case."

The judgment of the Court of Appeals for the S
Circuit was entered on January 10, 1962. That de
affirmed the judgment of conviction in the District
of the Southern District of New York entered Octob
1960 and the District Court's order, entered Octobe
1959, denying a motion for pretrial discovery and in
tion of petitioner's statements to the Internal Re
Service. On January 29, 1962, an order was entere
the Court of Appeals staying the issuance of the ma
to the District Court while this petition is pending.

Questions Presented

1. Is a witness requested to appear and testif
Special Agents of the Internal Revenue Service, wh
seeking evidence for the witness' criminal prosec
entitled as a matter of right to a copy or inspection
transcript of his testimony under Section 6(b) of the A
istrative Procedure Act, or is that right solely condit
upon the issuance to the witness of a subpoena as held
by the Court of Appeals for the Second Circuit?

2. Is a defendant, who has so moved under Rul
and 17(c) of the Federal Rules of Criminal Procedure
indictment but prior to trial, entitled to pretrial disc
of a transcript of his testimony, taken under oat
Special Agents of the Internal Revenue Service who
materiality of the statements to their recommend

defense has been conceded below by the Court of A
for the Second Circuit, or must the defendant be
discovery of his statements on the ground that said
ments cannot be categorized as "books, papers, doc
or tangible objects obtained from or belonging to the
ant" under Rule 16 or as evidentiary and relevant
Rule 17(c) as also held below by the Court of Appeal

3. Was it a violation of the petitioner's right
process of law under the Fifth Amendment or such
parture from the standards exacted for fair trials in
courts, for the District Court as affirmed by the C
Appeals to allow:

(1) the Government to commence the questioning
of its own witnesses with an attempt to impea
by showing the commission of misdemeanor
ceded by the Court below to be improper a
collateral use of the witness' prior sworn stat
which was not contradictory for the same p
in order to impute complicity in such offenses
petitioner for which he was not on trial?

(2) the Government to demand in the presence and
ing of the jury that the defense produce bo
ledgers which were in the possession of the
tioner and to use such records in the trial alt
they contained personal transactions of the
tioner?

(3) the Government in a net worth and expenditur
evasion prosecution to deny that petitione
entitled to personal exemptions which he ha
claimed when in its bill of particulars and th
the testimony of Special Agents of the In
Revenue Service the Government admitted tha
exemptions had been allowed as a basis fo
culating his proper income?

4. Did the Government fail to overcome the evidence of loans as a source of the apparent increase in petitioner's net worth so that as a matter of law petitioner was entitled to a judgment of acquittal?

Constitutional Provisions Involved

United States Constitution, Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statutes Involved

Title 5, United States Code, § 1005(b):

> "Issuance of process; investigations; transcript of evidence:
>
> (b) No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony." June 11, 1946, c. 324, § 6, 60 Stat. 240.

Title 26, United States Code, § 145(b):

"(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution." § 145(b) of the Revenue Act of 1936, 49 Stat. 1648, 1703.

Rules Involved

Federal Rules of Criminal Procedure, Rule 16:

"Rule 16. Discovery and Inspection:

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable."

Federal Rules of Criminal Procedure, Rule 17(c):

"(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when

they are to be offered in evidence and may, upon their production, permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

Statement of the Case

This petition seeks issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit to review that Court's judgment of January 10, 1962, affirming the judgment of conviction against petitioner in the United States District Court, Southern District of New York, on the 28th day of October, 1960, after a jury trial, on both counts of an indictment, Cr. 158-126, charging petitioner with income tax evasion under Section 145(b) of Title 26, United States Code, for the years 1952 and 1953 (R. 3a-6a).

The prosecution was based on the net worth theory. Using that method and basing its case substantially on purported admissions allegedly made by petitioner to special agents of the Internal Revenue Service, the prosecution alleged an understatement of income of $17,960.72 during the year 1952 and $16,370.68 during the year 1953, on which were allegedly due additional tax of $6,304.80 and $4,989.53, respectively (R. 3a, 4a, 6a-9a).

During the investigation conducted by special agents of the Intelligence Division of the Internal Revenue Service, petitioner was interrogated on four separate occasions at the office of the Intelligence Division then located at 90 Church Street, New York City (R. 30a-36a, 41a). On three of these occasions, on June 26, 1956 (Exhibit 8), on January 3, 1957 and on May 28, 1958 (Exhibit 10), petitioner was examined under oath in the presence of a stenographer and these statements were introduced in evidence upon the trial. On April 23, 1958, he was also questioned by the special agents, although not in the presence of a stenographer, but his statements were contained in a report made by the agents at the time (R. 32a-36a, 39a, 41a-42a, 56a, 163a, 177a). On all of these occasions, petitioner was represented by his accountant and lawyer, Milton Sloane, who died in April, 1960, several months prior to the trial (R. 41a-44a.

56a, 163a 165a, 172a). On the occasion of the last visit on May 28, 1958, petitioner was asked to identify a financial statement of his assets and liabilities as of May 3, 1949, which petitioner had previously furnished to the Government in connection with an agreement to pay taxes due the Government for prior years (R. 32a-34a).

A motion was made in the District Court on September 28, 1959, a year prior to trial, under Section 6(b) of the Administrative Procedure Act for a copy or inspection of the transcript of petitioner's testimony and for discovery and inspection of those statements under Rules 16 and 17(e) of the Federal Rules of Criminal Procedure (R. 21a-25a). The District Court denied petitioner's motion on the grounds that petitioner was not entitled to a copy of his statements under Section 6(b) because his appearances were not "compelled" by subpoena, denied it under Rule 16 on the ground the statements were not material, and denied it under Rule 17(e) on the ground the statements were not evidentiary and relevant (R. 28a).

The Court of Appeals for the Second Circuit in affirming stated, however, that insofar as the decision on Rule 16 was concerned, the statements were material (see Appendix to this petition).

When these statements taken from petitioner were offered at the trial, several of the answers from different interrogations were represented by the Government as being contradictory, and this used by the Government in an attempt to discharge its burden of negativing non-income sources of the alleged increase in net worth during the years 1952 and 1953 (R. 30a, 45a, 48a). After the statements had been put in evidence, it became apparent that many of the answers which the Government read to the jury as petitioner's were in fact made by Milton Shapiro, who accompanied petitioner to the interrogations as petitioner's representative (R. [illegible] 61a, 66a, 71a-72a).

Where Mr. Sloane learned his information, or on what theory or accounting procedure Mr. Sloane based his responses, was not indicated by the Government.

This denial of petitioner's right under the Administrative Procedure Act to a copy of his statements and the denial of their discovery and inspection under Rules 26 and 17(c), petitioner urges deprived him of even the semblance of a fair trial. Petitioner is an uneducated immigrant from the West Indies. For the handling of his business affairs and financial matters, and the preparation of his tax returns and schedules, he relied upon Milton Sloane, an accountant and attorney. As even portions of the statements read to the jury on trial indicate, R 69a-72a, 86a-94a, 110a-). The transactions which he examined on were explicable by Sloane. Had petitioner's statements been produced in response to his pre-trial motion, petitioner would have been able to clarify or explain that testimony of which he could have no recollection. When the statements were produced at trial, it was too late, for Mr. Sloane had died several months previously in April, 1960 (R. 172a).

Petitioner was also deprived of a fair trial as a result of several highly prejudicial errors which occurred at the trial:

(a) The Government was allowed on the cross-examination of one of its own witnesses, Lillian Shuttle, to impeach her, at the outset, by testimony to the effect that she had been convicted of "policy gambling" misdemeanors in such a manner as to indicate such discreditable behavior to petitioner. R 77a-110a). Petitioner's objections were overruled (R 115a, 124a, 125a) and his motions for a mistrial denied (R 120a, 129a-131a).

(b) The Government improperly in the presence of the jury that the defendant produce certain books and records (R 7a). These books and records were in

the possession of petitioner, and contained in the cattle ledgers, personal and corporate records, so identified by the Government's witness (R. 760, 764, 1040). Subsequently, they were received in evidence (R. 779, 1841). Petitioner's objections to the Government's demand in the presence of the jury for the production of these records and to their receipt in evidence on the grounds that such acts violated his rights against self-incrimination were overruled (R. 760, 764, 1040, 1841). Petitioner's motions for a mistrial on the same grounds were denied (R. 1040, 1041).

As part of its net worth computations, the Government introduced in its bill of particulars that petitioner's taxable income for 1937 was increased by disallowing such four exemptions claimed in his return (R. 1841). A special agent of the Internal Revenue Service who had investigated the case testified that the calculations of net income had been computed on that basis (R. 1842, 1843). In its argument, the Government contradicted its own witness, the best authority of its own witness, and petitioner's expectations by stating that there was no proof in the record that the petitioner supported three of the persons for whom the Government had allowed the exemptions and, therefore, no proof that such exemptions were allowable (R. 2184). The trial court refused to grant a corrective instruction on the ground that it would not go into "every little particular of evidence" (R. 2186). The Court of Appeals denied the trial rulings of the lower court presented (see Appendix to petition).

At the close of the Government's case against petitioner both under count one and under the second, petitioner moved for a judgment of acquittal based on the Government's failure to negate the legal exemptions

to special agents of the Internal Revenue Service that the apparent increase in net worth in 1952 and 1953 represented by the cash purchase and repair of a house in New Rochelle could be accounted for by loans, which motions were denied (R. 181a-185a, 217a, 238a). According to the statements the Internal Revenue Service had taken from him, petitioner borrowed cash in amounts varying from $15,000 to $22,000 from Brother John Lamb, a former real estate operator and disciple of Father Divine (R. 38a-39a, 134a). If there had been a loan or loans of sufficient amount, the Government admittedly would have no case (R. 108a). Government witnesses testified that the cash used to purchase the house had been provided by Lamb (R. 99a, 104a-105a, 110a), and that petitioner had attempted to mortgage the house in 1954 or 1955 to repay Lamb (R. 104a-106a). There was also testimony that Lamb and other followers of Father Divine made large cash loans without security, within authority, or notes, and purchased real estate with cash (R. 136a, 199a, 204a, 205a). The Government's showing was limited to testimony that some years after the loan, Brother Lamb appeared to be somewhat impecunious, but none of the witnesses testifying knew of Lamb's financial conditions in 1952 (R. 133a, 134a, 144a, 150a-151a). Under the strict standards required in a net worth prosecution, the Government failed to make a prima facie case, and the motion for judgment of acquittal should have been granted.

Reasons for Granting the Writ

1. Section 6(b) of the Administrative Procedure Act, 5 U.S.C. (1958 ed.), has not heretofore been interpreted

by the Supreme Court. In the decision below, the Court of Appeals held that petitioner, a witness appearing before special agents of the Internal Revenue Service, was not entitled under Section 6(b) to a copy or inspection of the transcript of his testimony taken under oath by special agents of the Internal Revenue Service whose duty was to investigate and prepare a criminal prosecution (see Manual of Instructions for Internal Revenue Agents: Investigations and Proceedings, ¶ 678, set forth hereinafter) because these appearances were not pursuant to a summons. The decision below is contrary to the legislative interpretation of Section 6(b) stated, contemporaneously with enactment of the statute, by the Senate and House Committees on the Judiciary in S. R. 752, 79th Congr. 1st Sess., 1945, pages 19-20, and H. Report, 79th Congr., 2d Sess., 1946, page 38. The decision below was also a departure from this Court's decision in *Edwards v. United States*, 312 U. S. 473, 61 S. Ct. 666 (1941), which held that a witness testifying before an administrative agency was entitled to a copy of the transcript of his testimony to prepare his defense. As the Government secured petitioner's conviction through its violation of 5 U. S. C. 1006(b), it was vitiated by the unlawful acts of the Government and should be reversed. See *Nardone v. United States*, 308 U. S. 96, 102, 78 S. Ct. 155, 158 (1939); *McNabb v. United States*, 318 U. S. 332, 344, 63 S. Ct. 608, 615 (1943).

2. The Court of Appeals decided below that a transcript of petitioner's sworn question and answer examination taken by special agents of the Internal Revenue Service before indictment was not discoverable by petitioner under Rule 16 of the Federal Rules of Criminal Procedure after

indictment but before trial even though the Court found they were material to the preparation of his defense because said transcripts were not included under "books, papers, documents or tangible objects" in which a defendant has had some prior proprietary or possessory interest. As to production under Rule 17(c) of the Federal Rules of Criminal Procedure, the Court of Appeals held the transcript was not evidentiary. The decision below attempted to resolve a conflict within the Second Circuit, a hopeless split between the District Judges on this question (see footnote under Point II). In agreement with the Second Circuit are opinions of the Courts of Appeals in the Fifth and Eighth Circuits, and District Court decisions in the Seventh Circuit, the Third Circuit, the Fourth Circuit, and the First Circuit. In conflict with these decisions is an opinion of the Court of Appeals in the District of Columbia and District Court decisions in the Fourth Circuit and in the Ninth Circuit.

In addition to the importance to the administration of criminal justice in resolving the conflicts which exist (see Point II, *infra*), the decision below is a direct departure from the ruling of the Supreme Court in *Gordon v. United States*, 344 U. S. 414, 417-18, 73 S. Ct. 369, 372 (1953), that a motion for production and inspection of a statement calls for the production of documentary evidence. The basic importance of a defendant's statements in a net worth prosecution has been recognized by this Court in *Holland v. United States*, 348 U. S. 121, 128-129, 75 S. Ct. 127, 132 (1954). It was also contrary to the broad interpretation to be accorded the limits of pre-trial discovery under Rule 16 and 17(c), which this Court established in *Bowman Dairy Co. v. United States*, 341 U. S. 214, 71 S. Ct. 675 (1951).

3. The additional prejudicial errors which petitioner contends deprived him of a fair trial raise questions the resolution of which is important to the administration of criminal justice and are directed to the supervisory power

which this Court has over the administration of criminal justice in the Federal courts. In addition, the steadily increasing number of tax fraud prosecutions predicated upon the net worth method of proof once again requires a clear and definitive statement by this Court that when the Government fails to negate a non-taxable source for the alleged increase in net worth, as a matter of law it has failed to sustain its burden of proof in these types of cases.

ARGUMENT

POINT I

Refusal to permit petitioner a copy or inspection of the transcript of his testimony was a denial of a right guaranteed by Section 6(b) of the Administrative Procedure Act.

The decision of the Court of Appeals for the Second Circuit below (see Appendix to this petition) that a subpoena must issue to entitle a witness to a copy or inspection of the transcript of his testimony at an investigatory proceeding of the Internal Revenue Service because the statutory language of Section 6(b) of the Administrative Procedure Act, 5 U. S. C. § 1005(b), includes the word "compelled" is contrary to the legislative history and is a narrow, restricted and unrealistic conception of the manner in which special agents of the Internal Revenue Service "compel" testimony without any need for the issuance of subpoenas.

The legislative history of Section 6(b) as reflected in

the Report of the Senate** and House*** Committees on the Judiciary clearly indicate the Section applies "whether or not a formal subpoena is actually issued."**** Those contemporaneous legislative interpretations of the statute, which applies to investigations by the Internal Revenue

** "(b) Investigations. Investigative process is not to be issued or enforced except as authorized by law. Persons compelled to submit data or evidence are entitled to retain or, on payment of costs, to procure copies except that in non-public proceedings a witness for good cause be limited to inspection of the official transcript.

"This section is designed to preclude 'fishing expeditions' and investigations beyond the jurisdiction of authority of an agency. It applies to any demand, whether or not a formal subpoena is actually issued. 'Non-public investigatory proceeding' means those of the grand jury kind in which evidence is taken behind closed doors. The limitation, for good cause, to inspection of the official transcript is deemed necessary where evidence is taken in a case in which prosecutions may be brought later and it is obviously detrimental to the due execution of the laws to permit copies to be circulated. *In those cases the witness or his counsel may be limited to inspection of the relevant portions of the transcript. Judges should in any case have copies or an opportunity for inspection in order to assure that their evidence is correctly set forth to refresh their memories in the case of state procedures, and to enable them to be advised by counsel. They should also have such copies whenever needed in legal or administrative proceedings.*" S. R. 752, 79th Congr., 1st Sess., 1945, pp. 19-20. (Emphasis supplied and omitted.)

*** "The limitation, for good cause, to inspection of the official transcript may be appropriately invoked by an agency where evidence is taken in a case in which prosecutions may be brought later and it would nullify the execution of the laws to permit copies to be circulated. In those cases the 'good cause' should be clear and convincing, then the witness or his counsel may be limited to inspection of the relevant portions of the transcript." H. R. 1980, 79th Congr., 2d Sess., 1946, p. 33.

**** S. R. 752, 79th Congr., 1st Sess., 1945, pp. 19-20.

Service", expliently specify that Section 6(b) guarantees a witness the right to a copy or inspection of the transcript of his testimony taken when the administrative investigation results in a prosecution against the witness."

Section 6(b) was anticipated by this Court in *Edwards v. United States*, 312 U. S. 473, 61 S. Ct. 669 (1941). Congress recognized that compulsion was inherent in the request of an administrative agency to a witness or *intended party* without any need for the issuance of a subpoena. The Court below did not. Compulsion may

* "None of the functions of the Treasury Department is exempt from any of the provisions of the Administrative Procedure Act except as specified therein. . . ." *Committee on Government Operations, Second Study of Administrative Organization, Procedure and Practice in the Federal Agencies*, 85th Cong. 1st Sess., p. 1064 (1957).

Barker v. Commissioner, 225 F. 2d 141, 143-144 (8th Cir. 1960);

United States v. Smith, 87 F. Supp. 203, 204 (N. D. Conn. 1949);

Ferras v. Nordley, 203 F. Supp. 737, 740 (N. D. Ga. 1962).

** Petitioner's testimony was taken during an investigation by special agents of the Internal Revenue Service. ¶ 678 of the Manual of Instructions for Internal Revenue Agents' Investigation and Procedure provides:

"In any investigation the special agent will be responsible for the criminal features of the case and for the procurement of proper proof to establish the criminal charge should prosecution be authorized. The Internal Revenue agent participating in such an investigation will be responsible for the audit features of the case and for the preparation of a record of the proof to support the act or omission in addition to the tax. In such an investigation the special agent will be responsible for the method of procedure in and conduct of the investigation. The special agent in charge will be the officer responsible for recommendation for or against a criminal prosecution and will, in his discretion, recommend the assertion of an act or omission in addition to the tax in cases [of] . . . criminal prosecution . . . not recommended."

be of any kind, the threat of prosecution however veiled, the menace of the past use of Internal Revenue laws as a means for punishing those whose reputations have been made notorious by publicity or non-judicial inquiry, the fear of the unlettered and ignorant when called upon in any manner by those clothed with the authority of the law, or the anxiety caused by the constant inquiry of officers of the same governmental agency over a period of years. All of these types of compulsion may be found in the present case.

To construe Section 6(b) otherwise would be to defeat the very needs of administrative agencies. To hold, as did the Courts below, that one who appeared before investigative agents and testified without insisting on a prior issuance of a summons waives the rights accorded to him under Section 6(b) is to place a premium on recalcitrance.

By denying petitioner the rights accorded him under Section 6(b) of the Administrative Procedure Act, the Court below failed to accord petitioner the benefit to which petitioner was clearly entitled under this Act of Congress. See *Benanti* v. *United States*, 355 U. S. 96, 101, 78 S. Ct. 155, 158 (1957); *McNabb* v. *United States*, 318 U. S. 332, 344, 63 S. Ct. 608, 615 (1943).

POINT II

The transcript of a defendant's statements to special agents of the Internal Revenue Service are within the provisions of Rules 16 and 17(c) of the Federal Rules of Criminal Procedure.

The decision below (see Appendix to this petition) does not reflect the sharp conflict that existed in the District Courts for the Second Circuit in rulings on motions pursuant to Rules 16 and 17(c) for discovery before trial but after indictment of a defendant's statement to Government

agents.* Previously the Second Circuit in *United States v. Louis Gim Hall*, 245 F. 2d 338, 341 (2d Cir. 1957) had characterized the problem of the District Court's power to

* In the Southern District of New York, the following judges held defendants' statements discoverable before trial under Rules 16 and 17(c): Judge Weinfeld in *United States v. Peace*, 16 F. R. D. 423, 424-425 (S. D. N. Y. 1954); Judge Bryan in *United States v. Berman*, 24 F. R. D. 30, 31-32 (S. D. N. Y. 1959) and *United States v. Shindler*, 24 F. R. D. 142, 146 (S. D. N. Y. 1959); Judge Palmieri in *United States v. Zimmerman*, 20 F. R. D. 587, 588 (S. D. N. Y. 1957); Judge Dawson in *United States v. Singer*, 19 F. R. D. 90, 91-93 (S. D. N. Y. 1956); Judge Ryan in *United States v. Schlater*, 19 F. R. D. 372 (S. D. N. Y. 1956); and Judge Sugarman in *United States v. Klein*, 18 F. R. D. 439, 440 (S. D. N. Y. 1955); and in the District of Connecticut by Judge Timbers in *United States v. Bandler*, 105 F. Supp. 448, 451-458 (D. Conn. 1952); and in the Eastern District of New York by Judge Raytiel in *United States v. Kastel*, 18 F. R. D. 477, 482-484 (E. D. N. Y. 1956).

In the Southern District of New York, the following judges have held that a defendant's statements were not discoverable before trial under Rules 16 and 17(c): Judge Herlands in *United States v. Feltz*, 18 F. R. D. 394 (S. D. N. Y. 1955); Judge McMahon in *United States v. Brevard*, 27 F. R. D. 250 (S. D. N. Y. 1961); Judge Cashin in *United States v. Van Allen*, 28 F. R. D. 329, 334 (S. D. N. Y. 1961); in *United States v. Geller*, 168 F. Supp. 502 (S. D. N. Y. 1958); and *United States v. Bennett*, 190 F. Supp. 181 (S. D. N. Y. 1958); Judge Metzner in *United States v. Angelet*, 26 F. R. D. 408 (S. D. N. Y. 1960); Judge McGohey in *United States v. Lopez*, 26 F. R. D. 174, 175 (S. D. N. Y. 1960); and *United States v. Johnson*, 25 F. R. D. 339 (S. D. N. Y. 1960); Judge Kaufman in *United States v. Duncan*, 22 F. R. D. 295, 297 (S. D. N. Y. 1958); *United States v. Malcia*, 154 F. Supp. 511, 513-514 (S. D. N. Y. 1957); and *United States v. Goach*, 19 F. R. D. 107 (S. D. N. Y. 1956); Judge Levet in *United States v. Panzino*, 20 F. R. D. 570, 571 (S. D. N. Y. 1957); and *United States v. Pentecoda*, 148 F. Supp. 485, 487 (S. D. N. Y. 1940); Judge Murphy in *United States v. Kamin*, 15 F. R. D. 421, 423 (S. D. N. Y. 1955); Judge Goldbloom in *United States v. Scully*, 15 F. R. D. 462 (S. D. N. Y. 1954); Judge Dimock in *United States v. Gilboe*, 15 F. R. D. 201 (S. D. N. Y. 1953); and in the Northern District of New York by Judge Brennan in *United States v. Martel*, 17 F. R. D. 326, 327 (N. D. N. Y. 1954).

compel pre-trial disclosure of a defendant's statement under Rules 16 and 17(c) as "a question of no little difficulty."* The difficulty of the question is reflected in the conflicting decisions of Courts in the various Circuits. Defendants' statements have been held discoverable before trial in *Epps* v. *United States*, 207 F. 2d 134, 137 (D. C. Cir. 1953), cert. denied 346 U. S. 885, 74 S. Ct. 135; *United States* v. *Carter*, 15 F. R. D. 367, 371 (D. D. C. 1954); *United States* v. *Brockington*, 21 F. R. D. 104, 107 (E. D. Va. 1957); and *United States* v. *Branson*, 16 F. R. D. 431 (N. D. Cal. 1954). Pre-trial discovery and inspection of defendant's statements have been denied in *Shores* v. *United States*, 174 F. 2d 838, 843-845 (8th Cir. 1949)**; *Schaffer* v. *United States*, 221 F. 2d 17, 19-20 (5th Cir. 1955); *United States* v. *Wortman*, 26 F. R. D. 183, 207-208 (E. D. Ill. 1960); *United States* v. *Black*, 6 F. R. D. 270 (N. D. Ind. 1946); *United States* v. *Rothman*, 179 F. Supp. 935, 937, 939 (W. D. Pa. 1959); *United States* v. *Copes*, 193 F. Supp. 627, 628 (D. Md. 1961); *United States* v. *Jannazzo*, 22 F. R. D. 223 (D. Del. 1958); *United States* v. *Bennetham*, 21 F. R. D.

*"There remains only appellants' contention that it was reversible error to deny their pre-trial motion to inspect the statements made by Wong following his arrest. Since we have decided that the judgment of conviction must be set aside, and the statements have now been disclosed by the prosecution, we need not decide whether the District Court has the power to order such a disclosure, a question of no little difficulty. See, e.g., Bowman Dairy Co. v. United States, 341 U. S. 214, 71 S. Ct. 675, 95 L. Ed. 879; Shores v. United States, 8 Cir., 174 F. 2d 838, 11 A. L. R. 2d 635; State v. Tune, 13 N. J. 203, 98 A. 2d 881, compare United States v. Feltz, D. C., 18 F. R. D. 384, with United States v. Peace, D. C., 16 F. R. D. 423." (245 F. 2d at 341)

**In *Shores*, the Court remarked, "Perhaps, as a matter of fundamental fairness, a defendant ought in enlightened criminal administration to be granted the right to have a copy of his confession in any case." 174 F. 2d at 844. This Court has suggested the same conclusion in *Crooker* v. *California*, 357 U. S. 433, 511, 78 S. Ct. 1287, 1301 (1958).

227, 229 (D. Del. 1957); *United States* v. *Chandler*, 7 F. R. D. 365 (D. Mass. 1947); as well as in the Second Circuit decision below.

A restrictive interpretation of the reach of Rules 16 and 17(c), such as that reached by the Second Circuit in this case, is a long step backwards from the Supreme Court's announcement of the scope of those Rules in *Bowman Dairy Co.* v. *United States*, 341 U. S. 214, 219, 220, 71 S. Ct. 675, 678, 679 (1951). There this Court noted that Rule 16 provided the only way a defendant could inspect documents accumulated by the Government in the course of its investigation of the case "so as to inform himself" and that Rule 17(c) established "a more liberal policy for the production and inspection of materials" at or before trial (341 U. S. at 219, 220, n. 5, 71 S. Ct. at 678, 679).

In the net worth prosecution below, the Second Circuit not only departed from the *Bowman* rationale but from its own clear statement of the particular necessity of a broad application of Rules 16 and 17(c) in a net worth case:

> "Although these rules have different functions and applications, they serve a related purpose: to enable the accused to meet the charges presented against him. They should be liberally interpreted to carry out this purpose. See Bowman Dairy Co. v. United States, 1951, 341 U. S. 214, 71 S. Ct. 675, 95 L. Ed. 879; Fryer v. United States, 1953, 93 U. S. App. D. C. 34, 207 F. 2d 134, certiorari denied 346 U. S. 885, 74 S. Ct. 135, 98 L. Ed. 389. To the defendant seeking to prepare a defense to a net worth criminal prosecution it is no answer to say that he should have kept better records, or that his memory should have been better." *United States* v. *O'Connor*, 237 F. 2d 466, 476 (2d Cir. 1956).

Notwithstanding, the decision below disregarded this Court's warning of the basic nature of a defendant's safeguards in a net worth case and danger resulting from the prosecution's use of them. See *Holland* v. *United States*,

348 U. S. 121, 128-129, 75 S. Ct. 127, 130 (1954), and *Smith v. United States*, 348 U. S. 147, 150-151, 75 S. Ct. 194, 196 (1954), where a pre-trial hearing had been held on the defendant's statement.

In this case, the Court of Appeals conceded that petitioner's statements were material to the preparation of his defense within the meaning of Rule 16, but sanctioned the denial of their production before trial on the grounds that transcripts are not within the category of "books, papers, documents or tangible objects, obtained from or belonging to the defendant." That ruling, as was the parallel holding that petitioner's statements were not relevant and evidentiary within the meaning of Rule 17(c), not only defeated the purpose of the Rules as stated in *Bowman*, it ignored this Court's ruling in *Goodman v. United States*, 344 U. S. 414, 417-418, 73 S. Ct. 369, 372 (1953), that statements given to Government agents are producible as documentary evidence.

Had petitioner's motion of September 28, 1959 for production and inspection of the transcripts of his sworn statements taken by special agents of the Internal Revenue Service (R. 21a-25a), been granted he would have been informed of the data given and statements made by Sloane, his attorney and accountant and could have then sought an explanation of their source and nature from that representative and elsewhere. When those statements were finally produced as the Government put them into evidence at the trial on October 20, 1960 it was far too late, for Sloane had died in April, 1960 (R. 172a).

POINT III

The decision below raised questions of importance to the administration of federal justice and erred in failing to place the burden of proof on the Government in a net worth prosecution.

Petitioner urges that the decision below sanctioned severely prejudicial errors in the conduct of his trial which raises questions of importance to the administration of federal justice and should invoke this Court's supervisory power. *See Elkins v. United States*, 364 U. S. 206, 208, 216, 80 S. Ct. 1437, 1439, 1443 (1960).

A. The Government Should Not Be Allowed to Impeach Its Own Witness and Thereby Impute Her Misdemeanors to the Defendant.

At the outset of the testimony of the Government witness, Lillian Smith, the Government was allowed over objection (R. 117a, 119a 120a, 124a, 125a, 129a-131a) to impeach her by showing her convictions for "policy gambling", misdemeanors under New York Law *, and to impute similar misconduct to petitioner (R. 117a-126a). The impeachment was improper and prejudicial in and of itself and was an attempt to attribute to petitioner guilt by inference and association which is forbidden in federal courts. *Michelson v. United States*, 335 U. S. 469, 475-76, 69 S. Ct. 213, 218 (1948); *United States v. Provoo*, 215 F. 2d 531, 536, n. 8 (2d Cir. 1954), and cases there cited. *United States v. Tomaiolo*, 249 F. 2d 683, 689 (2d Cir. 1957).

* New York Penal Law, § 974

B. The Government's Demand Before the Jury of Business Ledgers in Possession of the Defendant and the Use of Them at the Trial When They Contained Personal Records Was Error

In the presence of the jury, the Government called upon the defense to produce ledgers in their possession and was allowed to use them at trial although they contained personal records, all over petitioner's objections and motions for mistrial. R. 754-764, 766-768, 784-785, 820. The demand for ledgers containing petitioner's personal records in the presence of the jury compelled petitioner to be a witness against himself, in violation of the Fifth Amendment, and the use of those records at trial was a similar violation. *Counselman v. Hitchcock*, 142 U. S. 547, 562, 12 S. Ct. 195 (1892); *Boyd v. United States*, 116 U. S. 616, 6 S. Ct. 524 (1886); *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 40 S. Ct. 182 (1920); *Wilkinson v. United States*, 115 Fed. 972, 979-983 (6th Cir. 1902); *United States v. Lasco*, 115 F. Supp. 634 (S. D. N. Y. 1953).

C. In a Net Worth Case the Government Should Not Have Been Allowed to Deny Petitioner Was Entitled to Exemptions Admittedly Allowed

In its bill of particulars (R. 9) and through the testimony of the special agent who had investigated the case and computed petitioner's taxable income (R. 753-754, 1761), the Government admitted petitioner was entitled to three exemptions which he had not taken on his tax returns. On summation, the Government stated that petitioner was entitled to the exemptions (R. 2184), and the trial court refused to instruct otherwise (R. 2190). Petitioner was plainly entitled to the benefit of proving his taxable income for the years [illegible] and the issue of intent [illegible] *Holland v. United States*, 348 U. S. 121, 126, 75 S. Ct. 127, 130 (1954); *United States v. Neff*, 212 F. 2d 871, 880 (3d Cir. 1954); *United States v. [illegible]*, 115 F. Supp. 737, 740 (D. Conn. 1953); *United States v. Schneider*, 111 F. Supp. 265, 267 (D. D. C. 1953); 3 Wigmore, *Evidence* (3d ed. 1940), §§ 1057, 1064.

D. Judgment of Acquittal Should Have Been Directed on the Government's Failure to Sustain Its Burden of Proof

In a prosecution for tax evasion, the Government must either prove a likely source of income to account for the alleged increase in net worth or negative all possible non-taxable sources. *United States v. Massei*, 355 U.S. 595, 78 S. Ct. 495 (1958). In this case, the Government proved no additional income and its sole attempt to negative [illegible] suggested by petitioner, the loan from Brooklyn Bank, admittedly sufficient to offset the increase in net worth (R. 1054a), resulted in no showing, however inferential, that the loan was not, or even might not have been repaid in 1951 or 1952 (R. 1055a, 1144a, 1145a). Failure to disprove the source of non-taxable income from a lead suggested by the Internal Revenue Service by petitioner was a failure by the Government to discharge its burden of proof, and petitioner's motion (R. 1151a-1154a, 1155a) for judgment of acquittal should have been granted. *Holland v. United States*, 348 U.S. 121, 136-39, 75 S. Ct. 127, 135-37 (1954); *Fairchild v. United States*, 230 F. 2d 944, 948 (10th Cir. 1956); *United States v. Kahaner*, 167 F. Supp. 850, 852 (E.D.N.Y. 1958); *United States v. Wilson*, 141 F. Supp. 283, 284 (S.D. Ohio 1956); *United States v. Williams*, 141 F. Supp. 409, 414 (E.D. Pa. 1956).

CONCLUSION.

For the reasons above stated, petitoner respectfully urges a writ of certiorari should be granted to review the decision below of the United States Court of Appeals for the Second Circuit, and on granting of the writ that the judgment be reversed and the indictment be dismissed or the case remanded with directions to enter a judgment of acquittal or for a new trial.

APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 37 September Term, 1961.

(Argued September 27, 1961 Decided January 10, 1962.)

Docket No. 26741

UNITED STATES OF AMERICA,

Appellee,

v.

EDWIN MURRAY,

Appellant.

Before:

LUMBARD, *Chief Judge*,
FRIENDLY and SMITH, *Circuit Judges*.

Appeal from conviction under 145(b) of Internal Revenue Code of 1939 on two counts of income tax evasion, in the United States District Court for the Southern District of New York, Archie O. Dawson, *J.*

Affirmed.

EDWARD BRODSKY, Assistant United States Attorney, Southern District of New York, New York, N. Y. Robert M. Morgenthau, United States Attorney and Arthur I. Rosett, Assistant United States Attorney, on the brief, *for appellee*.

LOUIS BENDER, New York, N. Y., *for appellant*.

L. HAND, *Chief Judge:*

Edwin Murray appeals from his conviction on two counts of income tax evasion for the years 1952 and 1953 in violation of [illegible]145(b) of the Internal Revenue Code of 1939.[1] He was charged with reporting net income of only $6,504.45 and $4,038.09 for 1952 and 1953 respectively, whereas his net income for those two years calculated from increases in his net worth was allegedly $24,017.67 and $19,818.82, respectively. The government claimed that the difference in net income came from gambling activities; the defense was that the apparent increases in net worth came from a loan of $32,000 by one John Lamb. Murray was sentenced to imprisonment for one year and one day on each count, the sentences to run concurrently, and was fined a total of $5000.

Murray's appeal alleges that the government's evidence was insufficient to take the question of his guilt to the jury, that there were errors in the admission and exclusion of evidence, and that the trial judge erred in permitting the government to contradict its bill of particulars in summation. He also claims error in the denial of his pretrial demand for inspection of the transcripts of statements given by him to the Intelligence Division of the Internal Revenue Service. We affirm the conviction.

[1] Section 145(b) of Internal Revenue Code for [illegible]
[illegible] failure to collect and pay over tax, or attempt to defeat
[illegible] Any person required under this chapter
[illegible] account for and pay over any tax imposed by this chapter
[illegible] who willfully fails to collect or truthfully account for and
[illegible] pay over such tax, and any person who willfully attempts in
[illegible] any manner to defeat or evade any tax imposed by this chapter
[illegible] or the payment thereof, shall, in addition to other penalties
[illegible] provided by law, be guilty of a felony and upon conviction
[illegible] thereof, be fined not more than $10,000, or imprisoned not
[illegible] more than five years, or both, together with the costs of
[illegible] prosecution.

1. *The Sufficiency of the Evidence*

Murray attacks Judge Dawson's denial of his motion for acquittal at the close of all the evidence, claiming that the government did not prove beyond a reasonable doubt that the essential element in the alleged increase in net worth—the purchase and remodeling of a house in New Rochelle, New York, for a total of approximately $32,000—was not explained by the loan claimed to have been made by John Lamb. Murray does not attack the government's marshalling of evidence in other respects, and we see no reason to raise any other question as to its sufficiency.

The evidence supports the inference that Murray's gambling operations in 1952 and 1953 were "capable of producing much more income than was reported and in a quantity sufficient to account for the net worth increases." *Holland v. United States*, 348 U. S. 121, 138 (1954). And no attack is made upon the proposition that if the $32,000 expenditure was made out of income during the two tax years under consideration the statute was violated. Thus the question before us is whether the government satisfied its burden of producing sufficient evidence for the jury to find beyond a reasonable doubt, as Judge Dawson properly charged, "that the expenditure was not financed by a loan from John Lamb." We hold that on this question "taking the evidence in the view most favorable to the government, there is substantial evidence to support the verdict." *United States v. Tatone*, 269 F. 2d 488 (2 Cir. 1959).

The government's disproof of Murray's claim that the New Rochelle house was purchased and remodeled with funds lent him by John Lamb consisted largely of testimony tending to show that at the time of Lamb's death in 1955 and prior thereto he was in such financial straits that it was highly unlikely that during the period in question he had the resources to lend almost $32,000. Murray, in his last statement to the Internal Revenue Service, had said that he had paid off his debt to Lamb in 1954 or 1955; the government evidence as to Lamb's financial condition also

supported an inference that during those years Lamb had not received such repayment.

The government adduced testimony that John Lamb, who was a member of Father Divine's Mission in Harlem, lived in a Mission residence for a number of months prior to his death. Sunshine Bright, a housekeeper for the Mission, testified that on a number of occasions Lamb's checks in payment of his rent of four dollars a week were returned because of insufficient funds; she further testified that Lamb had been dispossessed from his real estate office for non-payment of rent. A friend of Lamb's, Rev. William Aaron, testified that between 1953 and 1955 he had on several occasions lent Lamb small amounts of money which had never been repaid, and that during the same period, while Lamb was living in Lamb's office, he had without payment provided Lamb with food and a blanket. In addition, there was evidence that on his entry into Harlem Hospital in 1955 Lamb had said that he had no income and no bank account, the only significant evidence that Lamb had any money was the statement of an Internal Revenue agent that Lamb's account at the Manufacturers Trust Company contained an average balance of five or six hundred dollars, but this falls far short of any likelihood that Lamb ever had $12,000 to lend to Murray. Cf. *United States v. Sidman*, 263 F. 2d 408, 411-12 (2 Cir.), cert. denied 360 U. S. 918 (1959); *United States v. Stiles*, 221 F. 2d 717, 720 (3 Cir. 1955).

Murray did not take the stand at the trial, but the government read into evidence excerpts from several pretrial statements which he made to the Internal Revenue agents who investigated his case. His conflicting versions of the source of the money used to buy and repair the house further strengthen the government's case. On June 30, 1956 he stated that the transactions had been financed with accumulated savings; on January 3, 1957 he said that his savings had been supplemented with a loan of $12,000 from gambling friends whom he would not identify; on April 23, 1958 he said that $13,000 to $15,000 had come from Lamb;

finally on May 28, 1958 he claimed—as did his counsel at trial—that the entire expenditure of $32,000 was financed by a loan of that amount from Lamb. There was no documentary evidence of such a loan. Murray supported his defense with the testimony of the broker handling the sale of the house that at the closing Lamb had been present and had $20,000 to $22,000 in cash with him which he turned over to the sellers; the broker also testified, without objection from the government, that later he had heard that Murray had borrowed the money from Lamb. Seymour Waterman, in whose name title to the house was taken and who was president of the holding company (wholly owned by Murray) to which it was subsequently transferred, also testified, again without objection, that Murray had told him that he was going to borrow money from Lamb to finance the house. This, together with the testimony of Mabel Hope to be considered below, constituted Murray's defense as Murray did not take the stand. We hold that there was ample support for the jury's rejection of the defendant's explanation.

II. *Objections to the Admissibility of Evidence*

A. *Testimony of Mabel Hope.*—To bolster its contention that the New Rochelle house had been financed by John Lamb, the defense called a Mrs. Mabel Hope, who testified that she had "followed" the Father Divine Mission, and knew "Brother" Lamb well. She further stated shortly after 1940 she had borrowed $2,000 from Lamb, without any documents, to buy a house, and that Lamb had told her "that Murray was a very nice fellow and he felt if [sic] he was his own son, and * * * he would help him in something. He said he would help him to do some kind of business. That is as much as he told me." This, together with Mrs. Hope's opinion that Lamb was "a wealthy man," does not, as we have indicated, detract materially from the substantiality of the evidence supporting the verdict, especially in the light of the fact that Mrs. Hope did not state

when it was that Lamb professed his disposition to aid Murray.

More specific attack is made upon the refusal of Judge Dawson to allow Mrs. Hope to answer defense counsel's question, "Did he indicate that he ever lent Ed Murray money?" We agree with Judge Dawson that any answer to this question would have been inadmissible hearsay. Obviously appellant's contention that this testimony should have been allowed because certain of the government's evidence was allegedly hearsay as well is unpersuasive. Nor do we see any force in the argument that Mrs. Hope's testimony should have been admitted under the hearsay exception relating to statements reflecting the state of mind of the declarant. *United States* v. *Annunziato*, 293 F. 2d 373, 378 (2 Cir. 1961), cert. den. U. S. ; 6 Wigmore, Evidence § 1725 at 31 (3d Ed., 1959). Clearly a statement by Lamb that he had on prior occasions lent money to the defendant, or even a statement that on this occasion he had lent him the $32,000 in question (the time reference of the question to Mrs. Hope being unclear) would tend primarily to show not Lamb's intention or state of mind toward Murray as he spoke but whether or not a loan had actually been made. Thus the out of court statement was offered for the forbidden purpose of proving the truth of its contents, and does not come within this or any other exception to the hearsay rule. *Shepard* v. *United States*, 290 U. S. 96 (1933); McCormick, Evidence, § 271 (1954).

B. *Testimony of Lillian Smith.* Lillian Smith, who was called by the government, testified on a variety of matters. She was secretary-treasurer of the holding company which held nominal title in the New Rochelle house, but her testimony about the payment at the closing of the sale (at which she was present) was totally inconclusive. She further testified that, "a few months before" the purchase of the house she had seen Murray with two shopping bags full of money, and that he had gotten the money "from gambling. He hit a number." On cross-examination, however, she

wavered as to the time when she had seen the money, admitting that it might have been as much as four years before the purchase of the house, and further said that she had no knowledge of the source of the money used to pay for the house or whether Murray had engaged in gambling since "years and years ago." On redirect, Miss Smith testified that she had once done housework for Murray, but denied any other employment connection with him. At that point, over the defense's objections, the government attorney confronted her with a prior statement signed by her to the effect that at one time she had been a numbers runner for Murray; in the statement dates were not established, but Miss Smith did say that she had not been a runner between 1953 and 1956. The judge permitted the use of the statement on the ground of surprise; Miss Smith denied its accuracy.

The appellant attacks the government's use of Miss Smith's prior inconsistent statement to impeach its own witness. We find no error. We agree with the trial judge that it was proper for the government to make use of a prior inconsistent statement of its own witness when she reversed herself on the question whether she had ever worked for Murray as a numbers runner. The implication of the prior statement that she had been a runner, but not in the years 1953 through 1956, might well be that she had been a runner in 1952, the first tax year in question, and thus that at that time Murray had been in the policy business. It was obviously material whether or not Murray was at that time in the policy business, and the government's case was harmed by Miss Smith's surprising answer.

The fact that the statement was used to cast doubt upon Miss Smith's negative testimony, and thus to build the government's case rather than merely to tear down testimony actually harmful to it does not make it any less admissible. We passed upon a similar situation in *Dibrizzo v. United States*, 6 F. 2d 303 (2d Cir.), cert. denied, 268 U. S. 706 (1925). In that case, in admitting a prior inconsistent

statement when a witness testified that she had been unable to identify her assailants as the defendants, we said:

> "The latitude to be allowed in the examination of a witness, who has been called and proves recalcitrant, is wholly within the discretion of the trial judge * * * The possibility that the jury may accept as the truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court." *Id.* at 368.

See *United States* v. *Allied Stevedoring Corp.*, 241 F. 2d 925 (2 Cir.), cert. denied, 353 U. S. 984 (1957).

This is not, like *United States* v. *Block*, 88 F. 2d 618 (2 Cir.), cert. denied, 301 U. S. 690 (1937), a case of an attempt to introduce an entire series of extrajudicial questions and answers when a witness refuses entirely to testify about matters on which he has previously been voluble. Rather, here the presentation was giving the jury an opportunity to determine the truth of Miss Smith's negative response to a single question by noting her prior inconsistent answer and observing her attempt to reconcile her previous statement with what she now claimed to be the truth. Thus the jury was to draw its conclusion not from the out of court statement, but rather from the witness' in court conduct when confronted with it. So considered, the statement was not hearsay.

Murray also claims that it was error for the trial judge to permit the government to begin its examination of Miss Smith by asking her about her criminal record. She testified that she had been convicted for policy dealings in 1942.

1943, 1956 and 1959, and that in 1939 she had been convicted of violating the election law. Murray's counsel objected to the relevancy of the testimony, and on two occasions moved for a mistrial. He claims that it was improper to ask questions pertaining to credibility before Miss Smith had given any other testimony, that the convictions brought out were incompetent to reflect on credibility since they were only for misdemeanors not involving moral turpitude, and that Murray was unduly prejudiced by the possible inference from his close connection with Miss Smith that he also had engaged in policy dealings.

The last claim of prejudice is without merit in view of Judge Dawson's meticulous corrective instructions. He asked Miss Smith explicitly whether her convictions had been in connection with any work she had done for Murray, and her answer was negative. He then went on to say "The jury will realize the fact that she has been convicted is not any indication that Mr. Murray had anything to do with the policy racket," and he stated that the testimony as to the conviction was to be considered only with relation to her credibility.

We find it unnecessary to consider whether it was error under the circumstances to permit the government to go into the credibility of its own witness in this way at the very outset of her testimony.[1] As this case evolved there

[1] In any event, Murray waived any objection to the use of misdemeanor convictions to reflect on credibility by his failure to raise the point specifically at trial. He should not be permitted to take on appeal a new point which he did not give the trial judge an opportunity to pass upon. See, e.g., *United States v. Nardello*, 241 F. 2d 557, 564 (2 Cir.), cert. denied, 351 U. S. 987 (1956). Timely objection was especially necessary here because it is not clear on the record what the nature of the convictions was. It is quite likely that they were in fact only for misdemeanors (the policy violations carrying fines under New York Penal Law § 974 and the election violations probably under New York Penal Law § 782), and it would have been error to permit their use for impeachment purposes other than credibility. See *United States v. Preston*, 215 F. 2d 531, 536 (2 Cir. 1954).

was no possibility of any prejudice to Murray from any attack on Miss Smith's credibility. She gave no affirmative testimony which was in any way helpful to Murray, and in fact Murray's counsel felt it desirable to argue in his summation that her testimony should not be believed. Thus Murray was more helped than harmed by any attack on her credibility, whatever the government's original motivation may have been.

C. *Admission of Books and Records.* At the trial, the government asked Murray's counsel "to produce the books and records of a corporation known as 561 West 144th Street Realty, Inc." On the previous day, the trial judge (off the record and thus apparently out of the hearing of the jury) advised counsel that unless the books and records were turned over to the prosecution voluntarily, a subpoena would be issued. In court, defense counsel stated to the trial judge that "I have them here, and if you direct me to turn them over, I will." When the judge responded "Yes," the papers were made available to the prosecution without any objection or restriction. When, however, during the examination of a former employee of Murray's accountant, the prosecution attempted to introduce them in evidence, the defense objected to the admission of some of them on the ground of the privilege against self-incrimination in that the books and records also contained personal records of the defendant.

Murray claims error in the trial judge's failure to give a requested corrective instruction after the government had asked for the records in the presence of the jury. No such instruction was needed, since there was nothing prejudicial in the wording of the request, as quoted in the preceding paragraph. No privilege attached to the corporate records requested; this not like *People v. Wershow*, 220 N.Y. 399, 115 N.E. 987 (1917), a case where the prosecution attempted to prejudice the defendant by making known to the jury the existence of inadmissible personal records.

Nor was the fact that before trial Judge Weinfeld had denied the government's motion for inspection of these

documents of any relevance. The grounds for the denial had nothing to do with the admissibility of the documents at trial; Judge Weinfeld merely held that the government had shown insufficient need to have them *before* trial.

Finally, we hold that defendant's objection to the admission of the books in evidence was both too late and not in the proper form. The privilege against self-incrimination does not prohibit the introduction of incriminating matter in evidence; it merely forbids it to be obtained from the defendant. *Spaulding v. United States*, 338 F. 2d 157, 163 (8th Cir.). The time for the defense to object on the ground that the records were personally incriminating was before they were turned over to the prosecution, not when the prosecution later attempted to use them in the actual examination of the accountant. Moreover, the defense had a right to withhold only those records which were personal. The rights of the defendant could have been amply protected if the defense had offered to the government only those parts pertaining to the corporation and had withheld the rest. In any event, the government made no use of the parts of the books pertaining to Murray's personal affairs, and there is no indication that there was in them any matter prejudicial to him.

III

[illegible]

Appellant also claims error in the trial court's permitting the government to argue in its summation that there was no evidence supporting exemptions for three dependents which it had stated in its bill of particulars and in the testimony of the investigating Internal Revenue agent that for purposes of calculating Murray's taxable income in the net worth theory it had allowed three exemptions. Murray contends in his brief that the lack of willfulness could be inferred from the fact that in the allegedly fraudulent returns Murray had not attempted to take exemptions for his three children. The government contends with the

argument that there was no evidence in the record to show that Murray qualified for the exemptions by actually supporting the children. The trial judge rejected a request that he charge the jury that the government had actually allowed the exemptions, saying: "I am not in my charge going to go into minutiae of the case."

Appellant's argument rests on the proposition that a bill of particulars binds the government for all purposes in the case in which it is given. The function of a bill of particulars is to enable the accused to prepare for trial and to prevent surprise, and to this end the government is strictly limited to proving what it has set forth in it. See, e.g., *United States* v. *Neff*, 212 F. 2d 297, 309, [illegible]. But saying that the government's case is limited to what it has specified is not the same as saying that for all purposes statements in a bill of particulars are evidence in the case. The bill of particulars merely stated that in arriving at the amount of taxable income alleged in the indictment it had allowed the defendant "four exemptions, one each for the taxpayer contained in the indictment, one exemption for himself and three for his children." It was not an admission that such exemptions were actually allowable. See *United States* v. *Neff*, 212 F. 2d 297, 309 [illegible]; *Berry* v. *United States*, [illegible] F. 2d [illegible] (C.A. 8, 1957). It was nothing more than a decision not to contest the propriety of the three exemptions which Murray might claim.

The bill of particulars is not evidence of itself; it is merely a statement of what the government will prove and not prove. Thus the question was: Was there evidence in the record from which Murray supported his three children? If so, the defendant could have sought a concession on this from the government or could have adduced proof of it. As it was, Murray's counsel chose to make the argument despite the fact that the record contained nothing to support it. Under these circumstances it was entirely proper for the government to argue in answer to the argument of Murray's counsel, that there was no proof in the record that he was entitled to the exemptions.

IV. *Pretrial Inspection of Murray's Statements to the Internal Revenue Service*

The final point for our consideration is the assignment of error in Judge Edelstein's denial of the defense's pretrial motion for inspection of the transcripts of Murray's several voluntary interviews with agents of the Internal Revenue Service. The motion was based alternatively on Rules 16 and 17(c) of the Federal Rules of Criminal Procedure and Section 6(c) of the Administrative Procedure Act, 5 U.S.C. § 1005(c).[1] Judge Edelstein held that

the defense had made insufficient showing of the "materiality" required for discovery under Rule 16, that pretrial inspection pursuant to subpoena was unavailable under Rule 17(c) because it had not been shown that the statements were "evidentiary and relevant," and that Section 6(b) of the Administrative Procedure Act was inapplicable because the statements had not been "compelled" by the Revenue Service. Because of the division among the district judges of this circuit as to pretrial inspection of a defendant's own statements, we shall elaborate the reasons for our affirmance of Judge Edelstein's denial of the motion.

A. Rule 16.—We hold that a transcription of a question and answer examination of one who later becomes a defendant in a criminal action is not discoverable by him under Rule 16 as within the category of "books, papers, documents or tangible objects, obtained from or belonging to the defendant." The language of Rule 16, its evolution in the Advisory Committee, see *United States v. Poltz*, 18 F. R. D. 394 (S. D. N. Y. 1955), and the Committee's final explanatory Note[6] all indicate that Rule 16 applies only to books, papers, documents or tangible objects in which a defendant has had some prior proprietary or possessory interest. The great weight of authority supports our unwillingness to stretch the word "belonging" to the point of saying that a stenographic transcript of a defendant's words "belongs" to him. See *Shores v. United States*, 174

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[6] *Compare, e.g., United States v. Poltz*, 18 F. R. D. 423, 425 (S. D. N. Y. 1955) (allowing inspection under Rule 16), *with, e.g., United States v. Poltz*, 18 F. R. D. 394 (S. D. N. Y. 1955) (denying inspection under both Rule 16 and Rule 17). For a recent thorough collection of the cases, both within the circuit and elsewhere, see *United States v. Lunt*, 129 F. Supp. 483, 485 (D. Conn. 1955).

The Note states that the rule is a restatement of the procedure whereby the courts had "made orders granting to the defendant an opportunity to inspect and copy his own statements belonging to him. . . ." It would be strange to speak of one making a statement as having a property interest in the paper on which his words are recorded.

F. 2d 838 (8 Cir. 1949); *Schaffer v. United States*, 221 F. 2d 17 (5 Cir. 1955); Kaufman, Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts, 57 Colum. L. Rev. 1113, 1114 (1957); Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 1053 (1961). Although Murray's Q-and-A statements were not signed, we can see no reason why a signed statement would any more have "belonged" to him within the meaning of the rule.

Although on this analysis it is unnecessary for us to pass upon the assertion in the district judge's order that the statements were not "material" to the preparation of Murray's defense, it would seem to us that the statements were material.

B. *Administrative Procedure Act* § 6(b)—We agree with Judge Edelstein that Section 6(b) is inapplicable to the statements Murray voluntarily made to the Internal Revenue Service. By its terms, Section 6(b) applies only to persons "compelled to submit data or evidence," and Murray's appearances were not pursuant to summons issued under § 7602 of the Internal Revenue Code of 1954, but rather were made of his own volition. Thus the case before us is distinguishable from *Backer v. Commissioner*, 273 F. 2d 141 (5 Cir. 1960) and *United States v. Smith*, 87 F. Supp. 293 (D. Conn. 1949), which held § 6(a) applicable to insure representation by counsel in a hearing held pursuant to a subpoena.

C. *Rule 17(c)*—Although a Rule 17(c) subpoena might under some circumstances be used to compel the government to produce the transcript of a defendant's statement for his use as evidence, Murray gave no reason which would have justified Judge Edelstein in exercising his discretion to require the government to produce his statement for inspection before the trial.

"Rule 17(c) was not intended to provide an additional means of discovery;" *Bowman Dairy Co. v. United States*, 341 U. S. 214 (1951). Its purpose is rather that of the traditional subpoena *duces tecum*, to permit a party to obtain "books, papers, documents or other objects" for use by him as evidence. The provision for pretrial inspection is merely a subsidiary one, "to expedite the trial by providing a time and place *before* trial for the inspection of the subpoenaed materials." *Id.* at 220; see Kaufman, *supra*, at 1116; Note, 67 Harv. L. Rev. 492, 496-97 (1954). We cannot agree with the implication in *Feger v. United States*, 207 F. 2d 134 (D. C. Cir.), cert. denied, 346 U. S. 886 (1953), that the mere likelihood that the government will use a defendant's statement as evidence (as Murray's statements were in fact used at trial) makes them "evidentiary" within the meaning of Rule 17(c) as interpreted by the Supreme Court in *Bowman*. If Rule 17(c) is interpreted to allow the defense to inspect any matter in the government's hand which might be used by it as evidence, we see little meaning left in the court's clear statement in *Bowman* that it is not an additional discovery device. Rather, we interpret *Bowman* as saying that Rule 17(c) is a device solely for the obtaining of evidence, for the use of the moving party; permitting him to examine the material obtained before trial only where, in the discretion of the court, it is necessary that he do so in order to make use of the material as evidence.

The only apparent evidentiary use to which a defendant could put his own statement would be to impeach the testimony of a government witness about its contents or, perhaps, to bolster his own testimony by showing its consistency with the prior statement in the event that the government introduced evidence of some other inconsistent statement. To be sure, we see no reason why after the government introduces such testimony at trial a defendant would not use Rule 17(c) to subpoena his prior statement

for his own use. Cf. *Jencks v. United States*, 353 U. S. 657 (1957). Although *Jencks* eliminated any requirement of a prior foundation of inconsistency (in the case of third party witnesses), the Supreme Court did not say that it was not necessary for the defendant to show some fairly immediate evidentiary need for the statements he sought, and it reaffirmed that it was not permitting a fishing expedition in the manner of discovery. We cannot say that there may never be a situation where it would be appropriate to allow a defendant to examine his own statement before trial.[2] Here, however, Murray had made no showing of such special need. Murray had counsel with him at each interview and it is hardly to be supposed that he and his counsel were without any notes of what had happened and without any memory of what was said. Under ordinary circumstances, such as these, we see no reason why there should not be sufficient time for defense counsel to make whatever impeaching or bolstering use of a statement he can if he obtains the transcript at trial. Murray has made no showing that he was in any way prejudiced by reason of not having had his statements made available to him before trial.

Affirmed.

[2] Judge Kaufman's article suggests the situation where the preparation of a defense or motion might require inspection of the statement of a prospective impeachment. Kaufman, *supra* at 1120. Judge Kaufman also discusses the possibility raised in *Rogers v. United States*, 174 F. 2d 845, 848 (8th Cir. 1949), of an inherent judicial power to allow discovery, in case of need, where it is not explicitly provided for in the rules. He concludes that "the courts remain free to allow discovery under their inherent authority to administer justice in federal courts." Kaufman, *supra* at 1121. We need not here consider whether such power exists, since the facts of this case fall far short of showing any earlier need for the statements.